

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,**

Plaintiff,

v.

VERIZON SERVICES, INC., *et al.*,

Defendant.

**Civil Action No. 01-2633
(CKK/JMF)**

REPORT AND RECOMMENDATION

There have been referred to me for Report and Recommendation the following motions:
Plaintiff's Motion for Summary Judgment, Defendant's Motions to Compel Designation of a
Witness Pursuant to Rule 30(b)(6) and of Elaine Harris, Plaintiff's Motion to Strike Verizon's
Affirmative Defenses, and Defendant's Motion That Defendant's Second Request for Admission
Be Deemed Admitted.

Nature of the Case

Plaintiff, Communications Workers of America, prevailed at arbitration over a question relating to union-member vacation. The parties disagree on the scope of the award, and plaintiff is requesting that this Court enforce the arbitrator's award. Currently pending before me are defendant's motions to compel depositions, plaintiff's motion for a protective order, plaintiff's motion for summary judgment, and defendant's 56(f) motion.

Background

Plaintiff, Communications Workers of America (“CWA” or “Union”), entered into a Collective Bargaining Agreement (“CBA”) with defendant, Verizon Services, Inc. (“Verizon”). In the Matter of the Arbitration Between Communications Workers of America – AFL-CIO and Bell Atlantic Network Services, Inc., Issue: 17% Vacation Selection (“Award”) at 9. Covered in the CBA is the administration of vacation for CWA employees. Id. at 9-10. Article 31, Section 10 of the CBA governs the selection of vacation days and has remained unchanged since 1980. Id. at 9. The selection process occurs in two rounds. Id. at 8-10. In the first round, employees choose whole weeks of vacation. Id. The second round allows employees to choose single days off. Id. Vacation time that is not used by an employee in these first two rounds becomes “reserved” time. Id. All of the vacation selection is then completed by the end of March each year. Id.

In 1998, in response to a potential strike, the parties came to a new agreement and memorialized it in a Memorandum of Understanding (“MOU”). Id. at 13. The MOU deals with the number of employees that can be scheduled for vacation at any one time. Id. at 8. After the 1998 MOU, Union employees were permitted to request, and defendant was required to schedule, vacation up until 17% of the employee’s workgroup was out (“17% rule”). Id. at 8. During the negotiations for the MOU, as found by the arbitrator, the parties never discussed the 17% rule in terms of selection. Id. at 15. Instead, the negotiation and ultimate agreement were founded on the scheduling of vacation days. Id.

Prior to the 1998 MOU, Union employee time-off scheduling was governed by force and load requirements. Id. at 7. Essentially, managers would forecast the demands on the

workgroup and allow employees to schedule time off so long as the demand was met. Id. at 7-8. In addition, the past practice required employees to make vacation scheduling requests no sooner than twenty-four hours before their shifts began. Plaintiff's Motions: To Strike Verizon's Affirmative Defenses and for a Protective Order; In Opposition to Defendant's Motion to Compel and for Delay Under Rule 56(f) ("Omnibus Motion"), James Davis Deposition at 97-100. If an employee needed time off for a shift that started within twenty-four hours, he or she was required to request a Short Notice Excused Work Day ("SNEWD"). Id. Every employee had three paid, and one non-paid, SNEWDs per year. Declaration of Mark F. Wilson at Exhibit 6.

Shortly after it was signed, a disagreement arose between the parties over the scope of the MOU. Award at 8-9. The Union's understanding was that the 17% rule applied when an employee requested vacation and less than 17% of his or her workgroup was scheduled for vacation regardless of when the request was made. Id. Verizon, however, interpreted the MOU to mean that if the vacation request was made after the close of the selection rounds, it was outside the scope of the 17% rule. Id. Such a request could be denied if the force and load demands were not met regardless of the workgroup's scheduled vacation percentage. Id. Verizon's belief was based on past practices. Id. Prior to the MOU, vacation scheduling was not guaranteed on short notice. Omnibus Motion, James Davis Deposition at 97-100. Once the twenty-four hour mark elapsed, time-off requests were governed by SNEWD procedures. Id.

Following the requirements of the CBA, CWA filed a grievance regarding Verizon's refusal to schedule vacation on short notice in line with the MOU. The CBA called for disputes of this nature to be settled by arbitration, and the parties subsequently arbitrated the matter.

Answer at ¶ 6. Ultimately, the arbitrator, Margery Gootnick (“Gootnick”), found that both parties agreed to the MOU and that the agreement was made by representatives who had the authority to make such an agreement. Therefore, according to Gootnick, the MOU “trumped” the CBA. Award at 30-31. Furthermore, Gootnick found that scheduling and selecting vacation were independent procedures. Id. at 11. Gootnick concluded that the MOU allowed employees to schedule vacation only if 17% of their workgroup was not already on vacation. Id. at 32.

Since Gootnick’s ruling, Verizon continues to refuse vacation schedule requests that are given on short notice. Answer at ¶ 15. Verizon asserts that, because Gootnick was aware that her authority did not extend to SNEWD matters, her award could not possibly extend to vacation requests within twenty-four hours of an employee’s shift. Defendant’s Statement of Points and Authorities in Opposition to Plaintiff’s Omnibus Motion of March 11, 2003 (“D. Opp. Omnibus Motion”) at 5. Therefore, according to Verizon, under CWA’s interpretation, Gootnick’s award exceeds the authority of the arbitrator. Id. at 5-7. Furthermore, Verizon asserts that CWA’s subsequent filing of a grievance over an identical issue is evidence that the case is not yet ripe for litigation. Id. at 5. Instead, the administrative remedies set forth in the CBA and MOU must be exhausted before the Union can bring suit. Id. CWA initiated the instant litigation to have this court enforce Gootnick’s award and reject all of Verizon’s arguments.

The Discovery Sought

Verizon seeks to take a deposition of the Union pursuant to Fed. R. Civ. P. 30(b)(6) and the deposition of Elaine Harris, a Union representative. Plaintiff resists any such discovery and, as noted, moves for a protective order barring it and for summary judgment. In response to the summary judgment motion, Verizon invokes Fed. R. Civ. P. 56(f), which requires a court to

either deny a motion for summary judgment or continue its resolution upon a showing by the opponent of the motion that she cannot present facts essential to justify its opposition. In support of its motion, Verizon relies upon the affidavit of one of its lawyers, Thomas M. Beck.

Defendant's Motion Under Rule 56(f) to Deny Plaintiff's Summary Judgment Motion Without Prejudice, Declaration of Thomas M. Beck, Pursuant to Rule 56(f) and 28 U.S.C. § 1746.

Beck explains that he learned in November 2002 that the Union had filed a grievance in West Virginia and a demand for arbitration "on the question of whether employees are contractually permitted to take vacation days with less than 24 hours' notice." *Id.* at 2. According to Beck, "[t]his represents the crux of Verizon's argument that the contractual grievance procedure—not this Court—is the appropriate forum for resolving the claim that [p]laintiff has asserted in this case." *Id.* Beck attaches to his declaration documents that indicate that Elaine Harris, whom Verizon seeks to depose, is a Union representative in West Virginia where the grievance arose. Another document sets out the parties' differences. It is clear from the document that the Union takes the position that a worker can demand a vacation day up to the very moment her shift starts; Verizon, on the other hand, insists that if the application for the day off comes within 24 hours of the commencement of the shift, the company may deny it absolutely (*i.e.*, irrespective of the 17% rule) and insist that the worker apply for and use a short notice excused workday. *Id.* Exhibit A. Thus, Verizon argues that the Union has raised for adjudication in this Court the very issue that it has raised by the grievance filed in West Virginia. According to Verizon, the filing of the grievance contradicts the Union's assertion that the Gootnick arbitration has resolved that issue. Because it did not, Verizon insists that the issue is a new issue that must be resolved not by this Court but by the grievance and arbitration process.

The Union disagrees and insists that no discovery is needed and that the Gootnick award clearly and completely resolves the issue of whether Verizon must grant a vacation day even if it is sought moments before the worker's shift begins.

Analysis

It is settled beyond all question in this jurisdiction that this Court abuses its discretion when it refuses to permit a party discovery before ruling on a motion for summary judgment. Information Handling Services, Inc. v. Defense Automated Printing Services, 2003 U.S. App. Lexis 16434 *21 (D.C. Cir. August 12, 2003); Athridge v. Rivas, 141 F.3d 357, 362 (D.C. Cir. 1998); Americable Int'l Inc., v. Dep't of Navy, 129 F.3d 1271, 1274 (D.C. Cir. 1998); Taylor v. FDIC, 132 F.3d 753, 765 (D.C. Cir. 1997); Assoc. of American Physicians and Surgeons v. Clinton, 997 F.2d 898, 911 n. 11 (D.C. Cir. 1993); First Chicago Int'l v. United Exchange Co., 836 F.2d 1375, 1380 (D.C. Cir. 1988).

Moreover, it cannot be said that Verizon's motion is based on, for example, nothing more than the mere assertion that discovery is needed and thereby invoke one of the narrow exceptions to the requirement that discovery must be permitted before the Court rules on a motion for summary judgment. See, e.g., Curtin v. United Airlines, Inc., 275 F.3d 88, 91 (D.C. Cir. 2001) (conceding that discovery was unnecessary before ruling on motion for summary judgment); Bastin v. Federal Nat'l Mortgage Assoc., 104 F.3d 1392, 1396 (D.C. Cir. 1997) (discovery sought based on rank speculation and a "fishing expedition"); Berkeley v. Home Ins. Co., 68 F.3d 1409, 1415 (D.C. 1995), cert. denied, 517 U.S. 1208 (1996) (counsel dilatory). To the contrary, Beck's affidavit specifically indicates why the discovery is needed and shows its relevancy to its defense, *i.e.*, Verizon will try to establish that its opponent has taken a position

contrary to the position it has taken in this lawsuit. It bears emphasis that this is not the time for the Court to evaluate the sufficiency or validity of that defense. To do so would be to do indirectly what the Court cannot do directly—rule on a motion for summary judgment without permitting the opponent of the motion a reasonable opportunity to take discovery to support its claim or defense.

Because I am of the view the Verizon is entitled to discovery before the Court rules on the Union's motion for summary judgment, it follows that I must also recommend that defendant's motion to compel depositions be granted, that plaintiff's motion for a protective order be denied, and that plaintiff's motion for summary judgment be denied without prejudice to renewing it once discovery is completed. To that end, I further recommend that the Court hold a status hearing to set dates for the conclusion of discovery by either party and set firm dates for the submission of any motions for summary judgment.

Requests for Admission

The Union has indicated that it will answer Verizon's Second Request for Admissions as soon as the Court rules that additional discovery is to be permitted. Plaintiff's Opposition to Defendant's Latest Discovery Motion at 3. Because I am of the view that it should be permitted, I would expect the Union to file its response in accordance with the Federal Rules of Civil Procedure within 30 days of the order issued by Judge Kollar Kotelly accepting this Report and Recommendation without any need for additional judicial orders.

Motion to Strike Verizon's Affirmative Defenses

I recommend that this motion be denied without prejudice until the conclusion of discovery. In my view, the issues it raises, such as whether Verizon waived the defenses it

would now assert, will be resolved by the resolution of any motion for summary judgment that is filed after discovery.

Failure to file timely objections to the findings and recommendations set forth in this report may waive your right of appeal from an order of the District Court adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated:

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